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FUJITSU LIMITED, and
FUJITSU MICROELECTRONICS AMERICA, INC.

FILED

DISTRICT COURT OF GUAM

APR 30 2007 *mha*

MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

NANYA TECHNOLOGY CORP. and
NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiff,

vs.

FUJITSU LIMITED, FUJITSU
MICROELECTRONICS AMERICA, INC.,

Defendants.

CIVIL CASE NO. 06-CV-00025

**REPLY IN SUPPORT OF EX PARTE
APPLICATION UNDER L.R. 7.1(j)&(k)
TO OBTAIN A MAY 2007 HEARING
DATE ON DEFENDANTS' MOTION
TO IMMEDIATELY TRANSFER FOR
CONVENIENCE**

1 Defendants Fujitsu Limited & Fujitsu Microelectronics America, Inc.
2 (“Defendants”) submit this reply brief in support of their *ex parte* application for an order
3 granting a May 2007 hearing of their Motion to Immediately Transfer.

4 **Plaintiffs’ Substantive Arguments Are Meritless**

5 Plaintiffs have not given any valid reason why the Court should not, in the
6 interests of judicial economy and justice, grant the requested relief. Plaintiffs first assert that
7 Defendants’ request for an immediate hearing of the transfer issue “breaches” the parties’
8 February 20, 2007 stipulation. (Opp. at 2). But the entire point of Defendants’ Motion to
9 Immediately Transfer is that it is based upon a change in governing law that occurred *after* that
10 stipulation, when the Supreme Court issued *Sinochem* on March 5, 2007. Had Defendants
11 asserted back in February that the motion to transfer could be heard before the motion to dismiss
12 for lack of jurisdiction, thereby avoiding jurisdictional discovery, Plaintiffs no doubt would have
13 argued that Defendants’ position was contrary to then-applicable Ninth Circuit precedent. *See*
14 *Patrickson v. Dole Food Co.*, 251 F.3d 795, 800 n.3 (9th Cir. 2001).

15 But that precedent has changed. It makes no sense to suggest that the Court and
16 Defendants now be asked to expend considerable resources following a pre-*Sinochem* path to
17 resolving all of the pending motions simply because Defendants did the right thing in February by
18 only asserting positions consistent with then-existing precedent.

19 Plaintiffs next assert that Defendants somehow “broke” an “agreement” regarding
20 scheduling the Motion to Immediately Transfer. (Opp. at 2-3). That is impossible because there
21 was never an agreement. Plaintiffs instead were insisting that Defendants agree to a highly
22 substantive, lengthy stipulation of fact in return for the mere procedural agreement of an early
23 hearing date. And then Plaintiffs ultimately refused to agree to the only early hearing date that
24 had been available from the Court -- Plaintiffs rejected the only available May hearing date, and
25 the next one available was not until July 12. Defendants now find themselves prejudiced from
26 having negotiated in good faith for approximately two weeks, as the open May hearing date
27 disappeared, and Defendants now must make this *ex parte* motion to obtain the May hearing date
28 they could have simply requested had they filed immediately. Although Plaintiffs’ Opposition is

1 quite liberal in its accusations of “bad faith” and “gamesmanship,” the facts of the record showing
2 the weeks of effort made by Defendants to obtain an agreement on hearing date speak much more
3 truly as to what occurred.

4 Plaintiffs also argue extensively as to why they do not believe the *Sinochem* case
5 applies here. (Opp. at 2-4). Plaintiffs narrowly view *Sinochem* as addressing only *forum non*
6 *conveniens* and not transfer under § 1404(a). But courts have already been applying the Supreme
7 Court’s *Sinochem* decision to transfer under § 1404(a). See generally *Howard University v.*
8 *Watkins*, 2007 WL 763182, *2 (D. Md. Mar. 12, 2007). But, in any event, to the extent Plaintiffs
9 urge that *Sinochem* and *Patrickson* are limited to *forum non conveniens*, then the pre-*Patrickson*
10 case law in the Ninth Circuit counsels in favor of hearing Defendants’ Motion to Immediately
11 Transfer. In particular, the court in *Multistate Legal Studies, Inc. v. Marino*, 1996 WL 786124
12 (C.D. Cal. 1996), found that immediate transfer to another district for convenience would serve
13 interests of justice because it would avoid difficult jurisdictional issues and would render
14 jurisdictional discovery moot. *Multistate* and similar precedent are discussed in more detail in
15 Defendants’ Motion to Immediately Transfer.

16 Plaintiffs also argue that “a tightened schedule and early hearing” would prejudice
17 Nanya. But Defendants are only asking that the Court decide, in May 2006, the narrow question
18 of whether this case should be transferred now, as *Sinochem* counsels. It could not be clearer that
19 Plaintiffs are perfectly capable of promptly briefing that issue as they have already mustered their
20 (incorrect) arguments in moving to transfer the California case to Guam, and in opposing this *ex*
21 *parte* application.

22 Plaintiffs claim that “Fujitsu cannot not explain why the jurisdictional inquiry in
23 this case is so ‘arduous’ that judicial resources are being wasted.” To the contrary, the record
24 already demonstrates the very real burdens being created by the literally hundreds of document
25 requests, requests for admission, and interrogatories being pursued by Plaintiffs with regard to
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1 “jurisdictional discovery,” along with four depositions, and Plaintiffs’ three failed motions to
2 compel. (Benjamin Certificate ¶ 4).¹

3 The record also is clear that, while Plaintiffs like to characterize this as a
4 straightforward “first-to-file” case, the truth is that this is the second action (after Tokyo), and that
5 the California action was actually the first to involve all parties, as only one of the two plaintiffs
6 was originally a party to this action. And it also is undisputed that almost all of the witnesses and
7 evidence in this case are located in Japan, Taiwan, California, or elsewhere on the U.S. mainland.
8 Thus, even should the Court ultimately disagree with Defendants’ Motion to Immediately
9 Transfer, with such a strong record as to the location of all the evidence and witnesses being
10 thousands of miles away from the forum, it at least makes sense to consider whether a more
11 convenient forum exists in before taking the next (more burdensome) steps in this case, especially
12 considering that the California Court has indicated that it is awaiting this Court’s determination.
13 (See Attachment A hereto (California Order)).

14 Finally, Plaintiffs quote the portion of *Sinochem* giving weight to “Plaintiffs
15 choice of forum.” The Supreme Court however went on to state: “When the plaintiff’s choice is
16 not its home forum, however, the presumption in the plaintiff’s favor ‘applies with less force,’ for
17 the assumption that the chosen forum is appropriate is in such cases ‘less reasonable.’” *Sinochem*
18 *Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. ___, 127 S.Ct. 1184, 1191 (2007).
19 Here, Guam is not Nanya’s home forum, and so the presumption in the Plaintiffs’ favor ‘applies
20 with less force.

21 **Defendants Complied with the Local Rules**

22 Plaintiffs further argue that Defendants violated Local Rule 7.1(e)(2) regarding
23 setting a hearing date. (Opp. at 2, 5-6). That is just not true. Indeed, Plaintiffs concede that
24 Defendants spent two weeks negotiating a hearing date (unfortunately to no avail), thus admitting
25 that Defendants’ made extensive efforts to work with opposing counsel and satisfied the local
26

27 ¹ And that is putting aside Plaintiffs’ recent, undisputed refusal to respond to any of
28 Defendants’ jurisdictional discovery. (*See id.*)

1 rules. The real complaint by Plaintiffs is that Defendants, once they learned that no May hearing
2 dates were left, did not call yet again to propose the hearing date offered by the Clerk's office of
3 July 12, 2007. But Defendants never called Plaintiffs to propose the July 12 date because that
4 was not a date that would give them the relief they were seeking. It makes no sense for Plaintiffs
5 to insist that Defendants were supposed to ask Plaintiffs if they would "agree" to a July 12 date
6 that Defendants themselves would not agree to. Rather, this was obviously an unusual situation
7 that was going to require a determination by the Court. That is why instead Defendants first filed
8 their Non-Agreement of Hearing Date, and then filed this *ex parte* application, providing to the
9 Court a full explanation as to why they sought an alternative earlier date, and providing Plaintiffs
10 not one, but two opportunities to address the hearing date issue (their purported "Agreement" on
11 Hearing Date and their Opposition to this application).

12 Lastly, Plaintiffs make the borderline frivolous assertion that Defendants violated
13 Local Rule 7.1(k) by failing to state reasons why a stipulation could not be obtained or notice not
14 given prior to bringing the *ex parte* application. (Opp. at 6). Actually, the Benjamin Certificate
15 very expressly states "[o]n April 23, 2007, following the hearing before the Court, I informed
16 Plaintiffs' counsel Joseph Razzano of our intent to bring this application unless an agreement
17 could be reached. Mr. Razzano responded that Plaintiffs would oppose the *ex parte* request,
18 wished to be served with any papers regarding it, and to be heard should there be a hearing
19 thereon." (Benjamin Certificate ¶ 7 (emphasis added)). And it further states that notice of the *ex*
20 *parte* application was being given. (Benjamin Certificate ¶ 8).

21 Plaintiffs also appear to be arguing that Defendants' motion is not sufficiently
22 urgent for *ex parte* relief. (Opp. at 6). That is obviously false on its face. Defendants are asking
23 in this *ex parte* application that the Court hear the Motion to Immediately Transfer in May. Their
24 moving papers cite in detail the (now undisputed) burdens of discovery and briefing that could be
25 saved through such a hearing. (See also Benjamin Certificate ¶¶ 4-5). If this *ex parte* application
26 were brought as a normal motion, it could not be decided until May was almost over, mooting out
27 the very relief requested. The potential benefits of a prompt hearing of the Motion to
28 Immediately Transfer would then likely be lost. The need to promptly set an early hearing date

1 through this *ex parte* application is clear from Defendants' papers and support granting the
2 requested relief.²

3 Respectfully submitted this 30th day of April, 2007.

4 **CALVO & CLARK, LLP**
5 **MILBANK, TWEED, HADLEY**
6 **& MCCLOY LLP**
7 *Attorneys for Defendants*
8 Fujitsu Limited and
9 Fujitsu Microelectronics America, Inc.

10 By:

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12 JENNIFER A. CALVO-QUITUGUA
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27 ² Notably, nowhere in their papers do Plaintiffs give the Court any reason to deny
28 Defendants' requested alternative relief that, if a hearing cannot be had in May, the Motion to
Immediately Transfer instead be heard no later than June 22. Thus, if the Court is unable to grant
the primary requested relief, Defendants respectfully renew that alternative request for relief.

ATTACHMENT “A”

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FUJITSU LIMITED ET AL,

Plaintiff,

v.

NANYA TECHNOLOGY CORP. ET AL,

Defendant.

NO. C 06-06613 CW

MINUTE ORDER

Date: 2/2/07

The Honorable Claudia Wilken, Presiding

Clerk: Sheilah Cahill Court Reporter: Raynee Mercado

Appearances for Plaintiff:

Chris Holm; Michael Murray; Christopher Chalsen

Appearances for Defendant:

Martin Fliesler; Alfonso Chan; Kenneth Shore

Motions:

Defendants	Mo. to dismiss for insufficient service of process or alternatively to quash service of process	Denied in part; granted in part
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Defendants	Mo. to dismiss, transfer, or stay case	Under Submission
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Further briefing due:

Order to be prepared by: Court

Case Management Conference Held?: Yes

Notes: Court denies motion to dismiss for insufficient service of process and grants motion to quash service of process; defendants will wait for letter of rogatory process. Court not inclined to dismiss, but let judge in Guam decide whether "first to file" rule applies; if Guam judge does not transfer here, Court inclined to transfer case to Guam. See separate Case Management Order for CMC dates.

Copies to: Chambers